

No. 200.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

ORDER OF RAILWAY CONDUCTORS OF AMERICA; H. W. FRASER
AS PRESIDENT OF THE ORDER OF RAILWAY CONDUCTORS OF
AMERICA, ET AL., *Petitioners*,

v.

THE PENNSYLVANIA RAILROAD COMPANY AND BROTHERHOOD OF
RAILROAD TRAINMEN.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia.

REPLY BRIEF FOR PETITIONERS.

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ARGUMENT.

The respondents, in urging the affirmance of the Court of Appeals' judgment, have advanced several arguments to which the petitioners reply as follows:

THE SWITCHMEN'S UNION DECISION.

Pennsylvania has argued that this Court's decision in *Switchmen's Union v. Board*, 320 U. S. 297, "correctly analyzed," is controlling here because the petitioners' suit attacks a certificate issued by the Board and for the additional reason that the Board is not present to defend its certification. (Penna. br. 16-24) The petitioners' argument to the contrary is said to be "fatally defective" because it "misconstrues" the *Switchmen's Union* case. (Penna. br. 32-38)

Pennsylvania's argument that the *Switchmen's Union* decision governs the instant case rests upon the premise that the Board considered the charges of carrier interference and influence set forth in ORC's October 28, 1942, letter of protest and determined those charges to be groundless.

1 Pennsylvania explains that "the actual decision of this Court in the *Switchmen's Union* case" was

"that a certification issued by the Board represents a final, conclusive and unreviewable determination with respect to the representation dispute for which it is issued; and that any such representations dispute between rival labor organizations which culminates in such a certification is thereby finally disposed of and cannot thereafter be the subject of consideration in a judicial proceeding." (Penna. br. 35)

2 Pennsylvania's argument that the *Switchmen's Union* decision governs this case proceeds substantially as follows:

1. The Board considered ORC's charges that Pennsylvania had interfered with, and influenced the conductors in their choice of a representative, and determined that those charges were invalid. (Penna. br. 9-10, 13, 19-20, 34, 38-42) That the Board did consider those charges and did determine them to be groundless, is said to be conclusively evidenced by "The Action of the Board" (in refusing to postpone the election and in certifying the winner of the election) and by "The Statements of the Board" (appearing in its reply to ORC's letter of protest, in its original and amended answers and in its brief below. (Penna. br. 38-42)

2. The charges of carrier interference and influence contained in the petitioners' amended complaint are the same as

The petitioners' argument that the *Switchmen's Union* decision is not controlling here, on the other hand, rests upon the premise that the Board, ruling that it has no power with respect to carrier interference antedating a representation election, did not consider ORC's charges of carrier interference.

It develops therefore, that a decisive issue in the present case is whether the Board did or did not consider ORC's charges of carrier interference. The following re-examination of all facts of record pertaining to this issue seems to be in order.

(a) Attached to the amended complaint as Exhibit "G" and appearing in the printed record at R. 23-33, is a copy of the October 28, 1942, letter wherein ORC protested to the Board that a representation election should not be held among the road conductors "at this time" for the reason, among others, that certain conduct on the part of Pennsylvania had interfered with and influenced the conductors in their choice of a representative. Also attached to the amended complaint as Exhibit "H" and appearing in the printed record at R. 33-40, is a copy of the Board's November 9, 1942, reply to ORC's letter of protest.

To the full extent it pertains to the charges of carrier interference and influence set forth in ORC's letter of protest, the Board's reply reads:

"In your letter the position of the Order of Railway Conductors is set forth under six separate counts,

the charges which were set forth in ORC's letter of protest; hence, the petitioners' suit calls upon the court to decide the same question as was decided by the Board—the question whether those charges are valid—and, in the event it determines those charges were valid, to set aside the certificate issued by the Board. (Penna. br. 13, 19-29, 38)

3. Therefore, the petitioners' suit asks for court review of the action taken by the Board in issuing a certificate. (Penna. br. 13, 23, 32, 37-38)

4
which for clarity we have further divided and summarized as follows:

3. An election at this time could not be said to be one without interference, influence or coercion exercised by the carrier.

4. (b) The management has been and is now attempting to coerce the Order of Railway Conductors committee into an acceptance of rules and working conditions contrary to long-established practice by directly and indirectly implying that the Order of Railway Conductors should agree upon a revised schedule before an election is held.

5. (a) The record clearly demonstrates some understanding, express or implied, between the carrier and the Brotherhood of Railroad Trainmen in an attempt to terminate representation of conductors by the Order of Railway Conductors on the Pennsylvania Railroad.

The above points are susceptible, we believe, to appropriate groupings for the purpose of consideration and discussion, and they are therefore being referred to under the three following general headings:

Nos. 2, 3(b) and 6(a) — *These items deal with alleged activity of the carrier designed to influence employees in their choice of representatives, which action is prohibited by Section 2, Third, of the Act. For convenience that part of the law here referred to is quoted as follows:*

Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence or coerce the other in its choice of representatives.

"The contentions which you make regarding the carrier's influence arise out of circumstances antedating the Board's investigation of this case which was begun on November 2, 1942, circumstances in respect of which the Mediation Board possesses no jurisdiction. Our power in such matters is to insure that during the time of taking a secret ballot or in exercising other methods of ascertaining the choice of representatives, the employees shall be free from interference, influence, or coercion by the carrier. This, the Board can and will do within a prescribed area if, and when, an election is being held.

"In this comment on carrier influence, it seems unnecessary to do more than point out to you that the Railway Labor Act prescribes an exclusive procedure for the protection of employees in the choice of representatives. The provisions of Section 3 as quoted above may be made effective through the application of Section 10 of the Act.³

"This leaves for final consideration your willingness to present further evidence in support of your statements and your request that you be afforded an opportunity to be heard. If you have in mind a formal hearing at which the interested parties would be present, we find nothing in the matters alleged in your protest which falls within the purview of a formal hearing customarily held in connection with representation disputes. As you know, hearing held by the Board under Section 2, Ninth, of the law has been for the purpose of determining who shall participate in an election.

"We shall be pleased, of course, to discuss orally with you or your representatives, if you wish, the basis upon which the Board has reached the conclusions stated herein, and we shall be glad to have you call at

³ In their amended answer, the Board and its members acknowledged that the district court "has jurisdiction to consider the validity of these charges on the merits on evidence *de novo*." (R. 74). This indicates the above paragraph in the Board's letter was intended to mean merely that the sole provisions in the Railway Labor Act empowering a district court to entertain a suit to enforce Section 2, Third, are those in Section 2, Tenth, and was not intended to mean that a suit to enforce Section 2, Third, cannot be entertained by a district court in the exercise of the power vested in it by the provisions of Section 24 (8) of the Judicial Code.

our office for this purpose any time you are in Washington.

In the above discussion we have dealt specifically with the issues raised by your protest as well as with your request for a hearing and we have pointed out the reasons why the Board is duty bound under the law to accept and act upon the Brotherhood's application. We have also shown why the Board cannot deal with the other matters presented by you. We do not find in your submission reference to any provisions of the Railway Labor Act under which your protest may be legally granted, nor does the Board, itself, find any such provisions. Therefore, we conclude we have no alternative but to continue the investigation of this case which was commenced at Philadelphia, November 2, and the mediator in charge of the investigation has been advised accordingly. (Italics supplied)

The petitioners submit the above excerpts from the Board's November 9, 1942, reply to ORC's letter of protest disclose (1) that the Board refused to investigate or consider ORC's charges of carrier interference, (2) that the Board's refusal was predicated upon the fact that those charges related to carrier conduct which had occurred prior to November 2, 1942, when the Board instituted its investigation of the representation dispute, and (3) that the Board stated its power under the Act with respect to carrier interference is limited to carrier interference which occurs during the progress of a representation election and does not extend to carrier interference antedating a representation election.

(b) The allegations that Pennsylvania engaged in certain conduct which interfered with and influenced the conductors in their choice of a representative, appear in paragraphs 14 through 33 of the amended complaint. (R. 6-17) In paragraphs 5 and 7 of their answer to this amended complaint the Board and its members state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 14 through 33 of the amended complaint. (R. 60 and 61)

Pennsylvania has said that the charges of carrier interference and influence set forth in ORC's October 28, 1942, letter of protest "are the same charges as those now contained in the present complaint." (Penna. br. 38). This being true, the declaration by the Board and its members that they are "without knowledge or information sufficient to form a belief as to the truth" of those charges, seems to contradict Pennsylvania's assertion that the Board gave "extended consideration" to ORC's charges. (Penna. br. 38)

In paragraph 37 of the amended complaint it is alleged that ORC's letter of protest (Exhibit "G") charged that Pennsylvania had interfered with and influenced the conductors' choice of a representative (R. 17-18), and in paragraph 40 it is alleged that in its reply (Exhibit "H") the Board refused to consider those charges and based its refusal on the ground that its power under the Act with respect to carrier interference and influence is limited to carrier interference which occurs during the time an election is in progress and within a prescribed geographical area (R. 18). In answer to these allegations the Board and its members stated merely that "said Exhibits 'G' and 'H' speak for themselves" (R. 62).

In paragraphs 41 and 42 of the amended complaint it is alleged that the Board did have the power and duty under the Act to consider ORC's charges of carrier interference, to determine the validity of those charges and in the event it determined the charges valid, to postpone the holding of a representation election among the conductors until such time as it should decide that carrier interference had ceased; and that the Board acted wrongfully and illegally in refusing to consider those charges and insure the conductors a free choice. (R. 18-19) In paragraph 11 of their amended answer the Board and its members categorically "deny the allegations contained in paragraphs 41 and 42 of the complaint." (R. 73)

It is apparent from the foregoing that the Board based and defended its refusal to consider ORC's charges of carrier interference on the ground that it has no power or duty under the Railway Labor Act with respect to carrier interference antedating a representation election.

(d) In paragraph 44 of the amended complaint it is contended that the election and certification of BRT as the conductors' representative should be set aside for either one or both of two reasons: First, because the Board failed and refused to perform its duty under the Act when it declined to consider ORC's charges of carrier interference, and, Secondly, because Pennsylvania in fact interfered with and influenced the conductors in their choice of a representative. (R. 19-20)

In paragraph 13 of their amended answer the Board and its members stated:

"In answer to paragraph 44 of the complaint, these defendants deny that the said election and the certification are illegal, null and void; they deny that the Board, in not determining whether the labor practices charged to the Pennsylvania Railroad would interfere with, influence or coerce the craft or class of road conductors in their choice of a bargaining representative, was failing to perform its statutory duty; they deny that the practices complained of constitute in fact unlawful coercion. For further answer these defendants allege: That the Board determined on the basis of the facts furnished by plaintiff Order of Railway Conductors, but without a hearing, that the instant charges did not allege carrier coercion directly affecting and occurring during the actual conduct of the election and that the Board therefore, as a matter of law, had no jurisdiction to consider the validity of these charges on the merits; that the Board was not required by the Constitution or the Railway Labor Act to hold a hearing to make such a determination; that this Court has jurisdiction to consider the validity of these charges on the merits on evidence de novo; that in view of the fact that the Board has not passed upon and is not authorized to pass upon the validity of these charges on the merits, these de-

pendants will stand neutral before this Court with respect to such issues." (R. 73-74) (Italics supplied)

Petitioners submit it is plainly evident from the above-quoted paragraph 13 of the Board's amended answer (1) that the Board did not investigate or consider ORC charges of carrier interference, (2) that the Board did not determine whether those charges were valid—that the Board did *not* determine the conduct charged would have "no bearing or effect on the election," (3) that the Board based and defended its refusal to consider those charges and to determine their validity on the ground that they related to circumstances antedating the holding of a representation election among the conductors and (4) that the Board held it has no power under the Act with respect to carrier interference antedating a representation election but has power only with respect to carrier interference which occurs during the time an election is in progress.

The conclusions which the petitioners have drawn from the foregoing portions of the record are not contradicted by the fact that in paragraph 13 of their amended answer the Board and its members "deny that the practices complained of constitute in fact unlawful coercion." (R. 74) That fact indicates merely that when, on May 11, 1943, the Board and its members answered paragraph 44 of the amended complaint, they alleged as one defense to the suit that the petitioners had not charged Pennsylvania with unlawful conduct—in other words, that the petitioners had not stated a cause of action. It does not even suggest, much less establish, that prior to January 7, 1943, when the petitioners amended their complaint and added paragraph 44 thereto, the Board had considered the charges of carrier interference set forth in ORC's letter of protest and determined the charges groundless; indeed, the italicized sentences in paragraph 13 of the amended answer establish beyond doubt that the Board did not consider or determine the validity of those charges before holding a representation

election among the conductors and certifying the winner of that election as the conductors' representative.

Nor are the conclusions which the petitioners have drawn from the foregoing portions of the record contradicted by the fact that in their brief below the Board and its members advanced the following argument:

"We prefer, however, to support the Board's decision that it lacked authority to investigate, hear, and determine these charges on a somewhat broader ground, a ground admittedly not the one mentioned in the Board's letter. * * * The ground for affirmance which we now advance is that the Board's duty is only to investigate whether employee representatives are designated and authorized without carrier coercion, and not to investigate whether other provisions of Section 2 not relating to designation and authorization of representatives have been violated. And we shall show that the charges of carrier coercion made to the Board on behalf of O.R.C. did not, even if accepted as true, relate to designation of employee representatives, and were thus not such as the Board was required to investigate in order to ascertain if they were well-founded." (Penn. Appendix 6(a))

This argument acknowledges that the Board did not consider or determine the validity of O.R.C.'s charges, and is explained as being advanced to support the contention that the Board's refusal to consider and to determine the validity of O.R.C.'s charges did not invalidate the election and certification.

The petitioners, therefore, respectfully submit that the factual premise upon which Pennsylvania's argument respecting the *Switchmen's Union* decision is rested, is entirely false.

BRT has summarized its argument that the *Switchmen's Union* decision is conclusive authority that the federal courts have no power to entertain the instant suit, as follows:

"There is little if any distinction in the proposition urged in the case at issue and the *Switchmen's* case

where the Board ruled that it had *no discretion to split a carrier* for the purpose of recognizing groups who had bargained under one contract for a long period of years as a separate class or craft, and the present case where the Board ruled it had no *jurisdiction* to consider coercion ante-dating the actual holding of an election. Since this Court in the *Switchmen's* case considered that the right was given under Section 2, Fourth, to have designated the appropriate crafts or class, incident to who might participate in an election under this section, and if it considered that the Board failed to exercise its duty on the theory that if had no jurisdiction to split a carrier this Court, should the petitioners' theory be correct, would have permitted the Federal Court to have considered the right given by Section 2, Fourth." (BRT br. 13-14)

Apparently this means that, in accordance with the *Switchmen's Union* decision, this Court will not consider or decide whether the Board is correct in the view that its power under Section 2, Ninth, with respect to carrier interference is limited to carrier interference which occurs during the progress of an election. If this is what BRT means, petitioners agree. They acknowledge that the Board's definition of its power under Section 2, Ninth, is not subject to challenge in the courts. (See Note 4, p. 27 of the petitioners' brief on the merits.)

II.

SECTION 2, TENTH.

Pennsylvania has advanced the argument that "the present suit must fail because it is not brought under the provisions of Section 2, Tenth." (Penna. br. 24) It is Pennsylvania's position that Section 2, Tenth, provides the exclusive method of judicial enforcement of the right guaranteed by Section 2, Third (Penna. br. 24-32), and that Section 2, Tenth, furnishes complete and adequate protection for that right (Penna. br. 42-45). In support of this position Pennsylvania asserts that the legislative history

of the 1934 amendments to the Railway Labor Act, as well as certain "practical considerations," indicate that Section 2, Tenth, (which is said to authorize United States district attorneys to institute both civil and criminal proceedings to enforce Section 2, Third), was intended to provide the exclusive method of judicial enforcement of Section 2, Third (Penna. br. 34-32), and that the remedy available to employees under Section 2, Tenth, for the enforcement of their right to freedom of choice is complete and adequate (Penna. br. 42-45).

The petitioners cannot agree with Pennsylvania's contention that Section 2, Tenth, authorizes the institution of civil proceedings to enforce Section 2, Third. To the petitioners' knowledge, it never before has been suggested that paragraph Tenth empowers United States district attorneys to inaugurate proceedings other than criminal proceedings to enforce the provisions of that paragraph.

The "practical considerations" which are urged by Pennsylvania as supporting its view that Section 2, Tenth, provides the exclusive method of judicial enforcement of Section 2, Third, are that railway employees and railway labor unions are irresponsible and cannot be trusted with the power to enforce their rights under the Railway Labor Act. It is said that if they should have the power to institute suits to enforce such rights the dockets of the courts would be crowded and railroads would be harrassed by suits having no foundation in fact, but filed by unions and employees solely out of their dissatisfaction with the outcome of representation elections.

At page 37 of its brief Pennsylvania says, with reference to the instant case:

"If the exclusive procedure specified by Congress had been followed in the present case, it is probable that this dispute would never have reached a district court, and certainly not this Court."

This statement prompts the petitioners to observe that if Pennsylvania was so completely confident that the instant suit is without foundation, it is strange that Pennsylvania has so strenuously opposed permitting the case to come to trial. The petitioners withhold making any observation, however, with respect to the clear implication of the above statement that this Court exercised something less than wisdom in granting the petition for certiorari in this case.

Paragraph Tenth defines as a crime the "willful failure or refusal of any carrier, its officers or agents to comply with the terms of the Third, Fourth, Fifth, or Eighth paragraph of this section." It provides that upon being convicted of this crime a carrier, officer or agent shall be subject to fine or imprisonment, or both, and it provides that

It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States; *all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.*"

Pennsylvania relies upon the above italicized clause in contending that Section 2, Tenth, "is not limited to criminal proceedings to punish violations of the rights specified, but also clearly contemplates affirmative judicial action in other types of proceedings, legal and equitable, brought by United States attorneys to prevent violations of Section 2 and to rectify conditions resulting from such violations." (Penna. br. 25) If, as Pennsylvania says, civil proceedings are authorized by this clause, it will be noted that such proceedings may be brought not merely to enforce compliance with "the Third, Fourth, Fifth, Seventh and Eighth paragraphs of this section," but to enforce *all the paragraphs* of Section 2. If this is true, and if it also is true, as Pennsylvania says, that Section 2, Tenth, provides the exclusive method of judicial enforcement of the rights under Section 2, it follows that this Court erred when it held in the *Virginian Railway* case (*Virginian Ry. v. Federation*, 300 U. S. 515) that federal courts may entertain suits brought by a certified representative (and not by a district attorney) to enforce the "treat with" requirement in Section 2, Ninth.

The petitioners submit that if Congress had intended to authorize district attorneys to institute civil proceedings to enforce *all rights, duties and prohibitions* under Section 2, it would have done so in clear, unmistakable language. The petitioners believe the assumption is unwarranted that Congress intended so to provide in a clause which is of obscure meaning and is buried in a statutory provision which defines as a crime the willful failure or refusal to comply with only particular duties and prohibitions under Section 2. The true meaning and purpose of that clause, the petitioners believe, should be gathered from the context; they believe it means merely that district attorneys may institute proceedings which are ancillary but necessary to the successful prosecution of criminal proceedings.

The petitioners have carefully examined the committee hearings, the majority and minority reports, and the Congressional debates on the 1934 amendments, but have found not a single intimation that Section 2, Tenth, was intended to authorize district attorneys to institute civil proceedings for the enforcement of the rights created by Section 2. On the contrary, whenever the paragraph was referred to it was identified as a "penalty paragraph" or by the "penalties" which it provided. See S. Rep. No. 1065, 73rd Cong., 2d Sess., p. 2; Hearings, Senate Committee on Interstate Commerce, 73rd Cong., 2d Sess., on S. 3266, pp. 14, 151, 152; Hearings, House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess., on H. R. 7650, pp. 28, 38, 133, 134.

Section 3, Tenth, was referred to by this Court in the *Virginian Railway* case as follows (300 U. S. at 545, N. 3):

"The 1934 amendments imposed various other obligations upon the carrier, to which criminal penalties were attached . . ."

It was referred to by this Court in the *M-K-T* case (*General Committee v. M-K-T, R. Co.*, 320 U. S. 323, 328, N. 6), and in the dissenting opinion in the *Switchmen's Union* case.

(320 U. S. 297, N. 15), in substantially the same manner. Nor can the petitioners agree with Pennsylvania's contention that Section 2, Tenth, provides an exclusive method for judicially enforcing Section 2, Third. Indeed, this Court has long since determined the contrary to be the case.

This Court held in the *Railway Clerks* case (*Texas & N. O. R. Co. v. Railway Clerks*, 281 U. S. 548) that the federal courts had the power to entertain a suit brought by a labor union to enforce the right guaranteed to employees by Section 2, Third, of the Railway Labor Act of 1926.

Pennsylvania says that when Congress amended the Railway Labor Act in 1934, it in effect "reversed" the *Railway Clerks* decision (Penn. br. 43-44). But in the *Virginian Railway* case, which involved the Railway Labor Act as amended in 1934, this Court stated (300 U. S. at 543-544):

"It [Congress] recognized their right to designate representatives for the purposes of the Act without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other." Section 2, Third, 44 Stat. 577. Under the last-mentioned provision this Court held, in the *Railway Clerks* Case, *supra*, that employees were free to organize and to make choice of their representatives without the "coercive interference" and "pressure" of a company union organized and maintained by the employer; and that the statute protected the freedom of choice of representatives, which was an essential of the statutory scheme, with a legal sanction which it was the duty of courts to enforce by appropriate decree.

"The prohibition against such interference was continued and made more explicit by the amendment of 1934. Petitioner does not challenge that part of the decree which enjoins any interference by it with the free choice of representatives by its employees, and the fostering, in the circumstances of this case, of the company union. That contention is not open to it in view of our decision in the *Railway Clerks* Case, *supra*, and of the unambiguous language of section 2, Third, and Fourth, of the act, as amended."

This statement clearly indicates that in the judgment of this Court the holding in the *Railway Clerks* case was not relegated to limbo by the 1934 amendments to the Act.

Pennsylvania contends, however, that when, in the *Virginian Railway* case, this Court made the above statements respecting the *Railway Clerks* case, it

"did not have in mind the considerations which it has spelled out in the *Switchmen's Union* case, nor did it have in mind the fact that Section 2, Tenth, added to the Act after the decision in the *Clerks* case, had provided a specific method for judicial protection of the right to freedom from coercion * * * (Penn. br. 45)

The petitioners are not inclined to agree that this Court did not know what it was talking about when it made the above statements. One of the problems with which this Court was concerned in the *Virginian Railway* case was the same problem presented by the *Switchmen's Union* case, "the nature and extent of the relief which courts are authorized by the Act to give" (300 U. S. at 538), and that this Court was aware of the nature and existence of Section 2, Tenth, is evident from the fact that the Court referred to and summarized that paragraph (300 U. S. at 548, N. 3).

Pennsylvania also asserts the above statements in the *Virginian Railway* decision have no application here because "the acts of coercion and interference alleged in that case occurred *after* the Mediation Board had certified the union as the representative of the employees." (Penn. br. 44). This assertion also is false. The district court's decree enjoining the *Virginian Railway* from interfering with its employees' choice of representatives was based on findings of fact which the district court summarized as follows (11 F. Supp. 621, 633):

"This unlawful interference and purpose to influence its employees has been evidenced chiefly through activities of the Railway in creating and promoting so-called independent organizations, both before and since the

election, and by its fixed determination not to recognize or treat with the chosen representatives of the crafts unless they came from an organization under its control." (Italics supplied)

This summary by the district court of its findings was adopted and quoted by the Fourth Circuit Court of Appeals when it affirmed the district court's decree (84 F. 2d, 641, 644), and this Court accepted "the current findings of fact of the two courts below" (300 U. S. at 542).

That this Court is of the opinion the *Railway Clerks* decision was not affected by the 1934 amendments to the Act is further apparent from its remarks respecting that decision in the *Switchmen's Union* case (320 U. S. at 300), in the *M-K-T* case (320 U. S. at 327, 329), and in *Stark v. Harkard* (321 U. S. 288, 306-307). In those cases this Court acknowledged that the right of action recognized in the *Railway Clerks* decision is an exception to the doctrine of the *Switchmen's Union*, *M-K-T* and *Southern Pacific* decisions. Pennsylvania is, in effect, insisting to this Court that it should broaden the sweep of that doctrine by abolishing the exception recognized in the decision's enunciating it.

Moreover, in view of the fact the *Railway Clerks* and *Virginian Railway* decisions were based on the principle that the federal courts will enforce rights created by the Railway Labor Act where necessary to save those rights from sacrifice (*Switchmen's Union v. Board*, 320 U. S. at 300), it is apparent that Section 2, Tenth, does not, in the judgment of this Court, furnish complete and adequate protection for the right guaranteed by Section 2, Third.

The extract from the report of the Senate committee on the 1934 amendments to the Railway Labor Act set forth in Pennsylvania's brief to support the assertion that Section 2, Tenth, furnishes an exclusive remedy (Penna. br. 28), in no way suggests that this penalty provision is intended to furnish the exclusive method for judicially enforcing the prohibitions and duties created by Section 2. With respect to the extracts from Mr. Eastman's testi-

mony before the Senate and House committees set forth in Pennsylvania's brief for the same purpose (Penna. br. 26-28), the petitioners believe that other portions of Mr. Eastman's testimony indicate that he did not mean Section 2, Tenth, would prescribe the exclusive method of judicial enforcement of the right guaranteed by Section 2, Third, but meant merely that the *only provisions in the Railway Labor Act* for the enforcement of the rights guaranteed in Section 2 were those in the proposed paragraph Tenth. In the course of his testimony before the Senate committee Mr. Eastman acknowledged that under the *Railway Clerks* decision a power obtains in the federal courts to entertain equity proceedings brought to enforce the right created by Section 2, Third, and urged that "the penalty paragraph," if adopted, would serve as an effective deterrent to violations of the duty created by Section 2, Third, and thereby complement and strengthen the existing remedy. (Hearings, Senate Committee on Interstate Commerce, 73rd Cong., 2d Sess., on S. 3266, pp. 151, 152.)

III.

THE M-K-T AND SOUTHERN PACIFIC DECISIONS.

The respondents argue that the charges of carrier interference set forth in the amended complaint are based entirely upon alleged violations of ORC's jurisdiction as the conductors' representative and that a decision whether Pennsylvania did interfere with the conductors' choice in the manner charged would necessitate a determination of the scope of ORC's jurisdiction as the conductors' representative—a determination which, according to this Court's decisions in the *M-K-T* and *Southern Pacific* cases, the federal courts have no power to make. (Penna. br. 45-62; M-K-T br. 18-23)

The petitioners anticipated and dealt with this argument at pages 14-21 of their brief on the merits. As there explained (pp. 15-16), the initial reason why the *M-K-T* and

Southern Pacific decisions do not govern here is that the charges of carrier interference set forth in the amended complaint are *not* based entirely upon alleged violations of ORC's jurisdiction as the road conductors' representative; the amended complaint contains several allegations charging that Pennsylvania interfered with the conductors' choice in other ways than by violating their representatives' bargaining jurisdiction.

Pennsylvania endeavors to dispose of this point by arguing that all the alleged acts relied upon by the petitioners as not involving a jurisdictional question are "integral phases" of the jurisdictional dispute. (Penna. br. 51-54) The petitioners are unable to see where this argument leads. Assume, *arguendo*, that "all the charges in the complaint against the Railroad [do] relate to the jurisdictional dispute" (Penna. br. 54).. Certainly the *M-K-T* and *Southern Pacific* decisions do not preclude a court from determining the validity of those charges if such a determination will not require the court to define the disputants' jurisdictional rights.

As explained in the petitioners' brief on the merits (pp. 16-19), the second reason why the *M-K-T* and *Southern Pacific* decisions do not govern here is that, although the petitioners' suit is based in part upon allegations of conduct by Pennsylvania which is asserted to have violated both the road conductors' right to a free choice and ORC's jurisdiction as the road conductors' bargaining agent, a decision whether such conduct did interfere with and influence the conductors' choice will not necessitate a determination whether it also violated ORC's jurisdiction as the road conductors' representative.

Pennsylvania endeavors to dispose of this point on two grounds, the first of which is explained in the following statement:

"But it is plain, under the Railway Labor Act, that the making of a collective bargaining agreement between a railroad and one labor organization cannot, of itself,

constitute the basis for a charge of interference and coercion by the railroad of a class of employees represented by another labor organization, unless it is also shown that the agreement is in some way unlawful and violative of the legal rights of such employees or of such labor organization." (Penna. br. 58)

What Pennsylvania overlooks is the fact that if it is proved the "making of a collective bargaining agreement between a railroad and one labor organization" interfered with the employee's choice of a representative, it is proved that the making of the agreement "was violative of the legal rights of such employees" under Section 2, Third.

Pennsylvania also endeavors to dispose of this point on the ground that none of the acts charged to Pennsylvania in the amended complaint interfered with, influenced or coerced the conductors' choice of a representative. (Penna. br. 49-51)⁵

In reply, the petitioners would point out that the question whether conduct on the part of a carrier interferes with, influences or coerces its employees in their choice of representatives, is a question of fact. See *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. at 558-560; *Virginian Ry. v. Federation*, 300 U. S. at 542. This being so, Pennsylvania's opinion as to whether it interfered with and influenced the conductors in their choice of a representative carries no great weight.⁶

⁵ It is interesting to compare the views expressed by Pennsylvania in its brief as to what constitutes "influence" with the views expressed on the same subject by Mr. M. W. Clement, President of the Pennsylvania Railroad Company, at the hearings before the House and Senate committees on the 1934 amendments to the Railway Labor Act (Hearings, House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess., on H. R. 7650, pp. 128-130, 133-134; Hearings, Senate Committee on Interstate Commerce, 73rd Congress, 2d Sess., on S. 3266, pp. 60-61, 65-66, 76-77).

⁶ That the Court of Appeals believed that the acts charged to Pennsylvania in ORC's letter of protest would, if true, have interfered with and influenced the conductors in their choice of a representative, is clear from the following statements in its opinion:

In any event, the question whether Pennsylvania in fact interfered with and influenced the road conductors' choice is not before this court. The only inquiry to be made in that connection here is whether, under the allegations set forth in the amended complaint, the petitioners on the trial of this case could introduce proof of facts on the part of Pennsylvania which could be found to have interfered with and influenced the conductors' choice. This Court necessarily will consider that question in deciding whether the federal courts have power to entertain this petitioners' suit.

IV.

THE BOARD AS A PARTY.

Pennsylvania argues that the "petitioners' failure to name the Board as a respondent in this Court" makes it "impossible for this Court to grant the relief sought in this proceeding." (Penna. br. 62-66)

In the last analysis, the basis of this argument is that the present suit calls upon the courts to review the Board's action in certifying BRT as the conductors' representa-

In the present case Conductors had, prior to this controversy, represented road conductors, and Trainmen had represented yard conductors. When the right of the former to continue to represent road conductors was challenged by Trainmen and it was charged that there was collusion between Trainmen and the Railroad, with the purpose of influencing the electors in casting their ballots, we think the Board should have investigated the charge before calling or holding an election. This seems to us to follow from [fol. 115] the provisions of the Section of the Act under which the Board is required to function. The Board's justification that jurisdiction to police the election was confined to the event itself, and not the circumstances leading up to it, does not appeal to us. See *Texas & N. O. R. R. Co. v. Brotherhood, &c.*, 281 U. S. 548 (141 F. 2d, 366, 367, R. 115)

Pennsylvania concedes that the allegations set forth in the amended complaint are the same as those set forth in ORC's letter of protest. (Penna. br. 38)

five. But such is not the case. The petitioners are not contending that the Board either failed to perform or improperly performed its duties and powers under the Act in issuing the certificate naming BRT as the conductors' representative. Therefore, the annulment of that certification will in no sense constitute a judicial admonishment of the Board for issuing that certificate. And since it is not the Board's province to enforce its certificates, the annulment of the certificate in this case will not thwart the Board in the exercise of any of its functions.

CONCLUSION.

For the reasons set forth in the petitioners' brief on the merits, it is respectfully submitted that the Court of Appeals erred in dismissing the instant case for lack of jurisdiction.

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There is no essential difference between the argument advanced at pages 62-66 of Pennsylvania's brief and the argument made at pages 22-24 thereof.